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No. 03-641

In The

Supreme Court of the United States

REGAL CINEMAS, INC. and
EASTGATE THEATRE, INC.,

Petitioners,

v.

KATHY STEWMON, TINA SMITH,
and KATHY BRADDY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether wheelchair users who patronize stadium-style movie theaters receive "lines of sight comparable to those for members of the general public" as required by the ADA Standards for Accessible Design when they are required to sit in the first few rows of the theater, in locations with objectively uncomfortable viewing angles, while nondisabled patrons can choose from a range of seating locations with comfortable viewing angles.

2. Whether the court of appeals erred in applying the principles of administrative deference articulated in *Auer v. Robbins*, 519 U.S. 452 (1997), by deferring to an agency interpretation of the "lines of sight comparable" provision that was evident from the provision's plain text.

3. Whether the court of appeals' decision constitutes impermissible retroactive lawmaking by reading the "lines of sight comparable" provision in accord with its plain text.

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STATUTES INVOLVED

Pertinent provisions of 42 U.S.C. §12182 of Title III of the Americans with Disabilities Act are reproduced in Respondents' Appendix.

STATEMENT

A. The Statutory Scheme

This case involves movie theater owners' obligation under the Americans with Disabilities Act (ADA) to provide wheelchair users with seating locations that are equivalent to those offered to nondisabled patrons. Title III of the ADA prohibits places of public accommodation, including movie theaters, 42 U.S.C. §12181(7)(C), from discriminating "on the basis of disability in the full and equal enjoyment of [their] goods, services, facilities, privileges, advantages, or accommodations." 42 U.S.C. §12182(a). The statute gives content to that general command with a series of provisions that define the concept of "discrimination" used in Section 12182(a). One of those provisions defines discrimination to include providing individuals with disabilities "with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals." 42 U.S.C. §12182(b)(1)(a)(ii). Another, especially relevant here, defines discrimination to include the "failure to design and construct facilities for first occupancy later than 30 months after July 26, 1990, that are readily accessible to and usable by individuals with disabilities." 42 U.S.C. §12183(a)(1). These provisions may be enforced by aggrieved private parties in suits for injunctive, but not

monetary, relief. See 42 U.S.C. §12188(a) (incorporating remedial provision of Title II of the Civil Rights Act of 1964, 42 U.S.C. §2000a-3(a)).

The statute required the Attorney General to issue regulations by July 26, 1991, "to carry out" Title III's substantive provisions. 42 U.S.C. §12186(b). It also required a separate agency, the Architectural and Transportation Barriers Compliance Board (commonly known as the Access Board) to issue "minimum guidelines" by April 26, 1991, that would "ensure" that facilities "are accessible, in terms of architecture and design, transportation, and communication, to individuals with disabilities." 42 U.S.C. §12204(a), (b). The statute directed that the Attorney General's regulations "be consistent with" the Access Board's minimum guidelines. 42 U.S.C. §12186(c). Pursuant to those grants of regulatory authority, the Access Board issued minimum accessibility guidelines for facilities, which the Attorney General then adopted as the ADA Standards for Accessible Design. See 28 C.F.R. Pt. 36, App. A. The Attorney General's regulations implementing ADA Title III specifically require all newly constructed facilities to "comply with th[os]e standards for accessible design," which are commonly referred to as the ADAAG (ADA Accessibility Guidelines). 28 C.F.R. §36.406(a).

One of the provisions in the ADAAG, Section 4.33.3, addresses the placement of wheelchair locations in assembly areas such as movie theaters. See 28 C.F.R. Pt. 36, App. A §4.33.3; see also *id.* §3.5 (defining "assembly area"). Section 4.33.3 provides, in relevant part, that "[w]heelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines

of sight comparable to those for members of the general public." *Id.* §4.33.3.

B. The Facts

This case involves six multi-screen theater complexes owned and operated by Petitioners in the Portland, Oregon, area. Each complex was built after 1993 and contains 9 to 16 separate movie theaters. The theaters utilize a "stadium-style" design, "which places most of the theater seats on stepped risers rather than on a sloped floor." Pet. App. 3a-4a. As the court of appeals explained, "[i]n most cases, the first few rows at the front of the theater are set on a sloped floor; there is an aisle at the entry level of the theater separating the sloped portion of the seating from the riser section, and the stadium seats (approximately 6-13 rows) then rise behind the aisle, with each row raised 15-18" above the one in front of it." Pet. App. 4a.

As Petitioners note (Pet. 2), the stadium-riser design is very popular with movie theater patrons. But Petitioners have denied wheelchair users access to the stadium-riser seats. In five of the six complexes at issue here, Petitioners have placed all wheelchair locations in the first few rows, in the front sloped section of the theater, instead of in the stadium riser seating. Pet. App. 4a. Over half of the 278 wheelchair seats in these complexes are in the very front row, some as close as 11 feet from the screen, making them essentially the worst seats in the house. C.A.E.R. 41, 43-58.[1] At Petitioners' theaters, "the vertical

[1] Further, unlike the view from the stepped seating in the riser section, the view from the sloped section is partially obstructed. The

(Continued on following page)

lines of sight for the wheelchair seating locations ranged from 24 to 60 degrees, with an average of approximately 42 degrees, as compared with the average median line of sight of 20 degrees in the non-wheelchair seating – a difference [Respondents'] experts termed a 'tremendous disparity.'" Pet. App. 4a-5a. Nondisabled patrons "find seats that possess the only viewing angles available to wheelchair access users among the least preferable to sit in." C.A.E.R. 108. And wheelchair users "cannot slump in their seats and recline their bodies in order to adjust for the unfavorable viewing angle, as can able-bodied patrons sitting in the same part of the theater." Pet. App. 5a.

An expert witness explained that such high positive viewing angles force wheelchair users "to tilt their heads upwards unsupported to view the movie screen," a posture that "will lead to the rapid onset of pain and discomfort." C.A.E.R. 112. As the court of appeals explained, the Society of Motion Picture and Television Engineers (SMPTE) has "concluded that, for most viewers, physical discomfort occurs when the vertical viewing angle to the top of the screen exceeds 35 degrees." Pet. App. 5a. The three Respondents, wheelchair users who patronized petitioners' theaters, all experienced significant discomfort when forced to sit in the first few rows: Kathy Stewmon "had to keep moving [her] head back and forth to look at the whole movie screen" and became "dizzy trying to focus," Pet. App. 5a-6a (quoting Stewmon); Tina Smith experienced a headache and nausea, Pet. App. 6a; and

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seats in the sloped section have only a 3 inch vertical rise over the row in front, C.A.E.R. 60, as compared with as much as 18 inches between stadium rows. Pet. App. 4a.

Kathleen Braddy testified that "she would have had to bend her neck back to the point where her vision would have been blurry" to sit in the wheelchair-accessible rows, Pet. App. 6a.

C. Prior Proceedings

Respondents brought this action in the United States District Court for the District of Oregon. As relevant here, Respondents contended that Petitioners' wheelchair seating arrangements violated ADAAG §4.33.3's requirement that wheelchair users enjoy "comparable" lines of sight to those offered nondisabled patrons. Respondents sought injunctive relief on that ADA claim.

The district court granted summary judgment to Petitioners, Pet. App. 36a, but the court of appeals reversed and remanded, *id.* at 3a. Deferring to the Department of Justice's interpretation of its regulation, Pet. App. 12a, the court of appeals concluded that Section 4.33.3's requirement of "comparable" lines of sight mandates "a viewing angle for wheelchair seating within the range of angles offered to the general public in the stadium-style seats." Pet. App. 17a. The court relied on dictionary definitions of the terms "comparable" and "lines of sight." Pet. App. 13a. It also relied on guidelines from the SMPTE and the National Association of Theatre Owners (NATO), both of which indicated the general industry practice of measuring lines of sight based on the angle above or below the horizontal on which those lines lie. Pet. App. 13a-14a. The court specifically rejected Petitioners' argument that the "comparable" lines of sight requirement had no application here because Section 4.33.3's drafters did not anticipate that stadium-style movie theaters would be

developed some years after the promulgation of the regulation: "[T]he issue is whether a broadly-drafted regulation – with a broad purpose – may be applied to a particular factual scenario not expressly anticipated at the time the regulation was promulgated – a question that the Supreme Court has answered in the affirmative." Pet. App. 16a (citing *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998)).

Accordingly, the court of appeals reversed the district court's grant of summary judgment to Petitioners and instead directed entry of summary judgment to Respondents. Pet. App. 17a. It remanded, however, without prescribing the remedy the district court should issue for Petitioners' violation of Section 4.33.3.

REASONS FOR DENYING THE WRIT

The ADA Accessibility Guidelines (ADAAG) require Petitioners to provide wheelchair locations with "lines of sight comparable to those for members of the general public." 28 C.F.R. Pt. 36, App. A §4.33.3. The court of appeals held that Petitioners violated the requirement to provide "comparable" lines of sight because "[i]n the theaters at issue in this case, wheelchair-bound movie theater patrons must sit in seats that are objectively uncomfortable, requiring them to crane their necks and twist their bodies in order to see the screen, while non-disabled patrons have a wide range of comfortable viewing locations from which to choose." Pet. App. 17a. That holding, which represents the most obvious reading of the relevant regulation, is also plainly required by the statutory text. As the court of appeals concluded, it is "simply

inconceivable that [Petitioners'] arrangement could constitute 'full and equal enjoyment' of movie theater services by disabled patrons." *Id.* (quoting 42 U.S.C. §12182(a) (providing that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation")).

There are no "compelling reasons," S.Ct. R. 10, for this Court to review the court of appeals' decision at this time. Although the Fifth Circuit in *Lara v. Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir. 2000), reached a different conclusion, the court of appeals' decision here is in accord with the holding of the only other circuit to have addressed the question since *Lara*. See *United States v. Cinemark USA, Inc.*, 2003 WL 22508500 (6th Cir., Nov. 6, 2003). As Petitioners note, a number of "cases presenting the same issue are now pending" throughout the country, Pet. 12, and the Access Board might address this issue in the current round of revisions to the ADAAG. Especially given the essentially interlocutory nature of the decision below, this is precisely the sort of question on which further percolation in the lower courts and the administrative process is appropriate.

Petitioners also urge that this Court grant certiorari "to explain the limits of *Auer* [*v. Robbins*, 519 U.S. 452 (1997)] deference," Pet. 25, and to hold that the court of appeals engaged in unconstitutional retroactive lawmaking, *id.* at 26-27. Petitioners can identify no split in the circuits over these questions. To the contrary, they seek nothing more than garden-variety error correction of the lower court's purported misapplication of settled administrative law principles. Accordingly, this Court should deny the petition for writ of certiorari.

I. Review Of The Court Of Appeals' Interpretation Of ADAAG §4.33.3 Is Premature

The court of appeals adopted the most natural reading of the ADAAG requirement that wheelchair locations have "lines of sight comparable to those for the general public." 28 C.F.R. Pt. 36, App. A §4.33.3. As that court explained, wheelchair users in Petitioners' theaters had "no choice but to sit in the first few rows of the theater," Pet. App. 4a, with no access whatsoever to the riser seating that is the *raison d'etre* for the stadium-style design. See Pet. 2. And "the vertical lines of sight for the wheelchair seating locations ranged from 24 to 60 degrees, with an average of approximately 42 degrees, as compared with the average median line of sight of 20 degrees in the non-wheelchair seating." Pet. App. 4a-5a. This disparity is especially significant given that "for most viewers, physical discomfort occurs when the vertical viewing angle to the top of the screen exceeds 35 degrees," *id.* at 5a, and that wheelchair users, unlike nondisabled patrons, "cannot slump in their seats and recline their bodies in order to adjust for the uncomfortable viewing angle," *ibid.*

In these circumstances, the court of appeals readily deferred to the Department of Justice's interpretation of the "lines of sight comparable" language of the regulations as including viewing angles, Pet. App. 13a-15a, and held that Petitioners' theaters did not comply with that requirement, see *id.* at 17a. But the court's decision was quite evidently driven by the plain text of both the regulations and the ADA itself. See *id.* at 13a-14a (relying on dictionary definitions of "line of sight," as well as publications from the SMPTE and the NATO that treat the term as encompassing viewing angles); *id.* at 16a (stating that "the fact that DOJ may not have been contemplating

viewing-angle issues in the context of stadium-style seating at the time when §4.33.3 was promulgated is not dispositive" given the "broadly-drafted" wording of the regulation); *id.* at 17a ("We find it simply inconceivable that this arrangement could constitute 'full and equal enjoyment' of movie theater services by disabled patrons."). More recently, the Sixth Circuit, adopting the same interpretation of the "lines of sight comparable" language as did the appellate court here, expressly rested on "the plain meaning of ADAAG §4.33.3." *United States v. Cinemark*, *supra*, at *4.

The only other federal appellate case to address the application of Section 4.33.3 to stadium-style movie theater seating reached a contrary conclusion. See *Lara*, *supra*. But subsequent cases have pointed out a number of serious errors in the *Lara* court's reasoning. For one thing, that court read "the phrase 'lines of sight comparable'" as requiring only "that theaters provide wheelchair-bound patrons with unobstructed views of the screen." *Lara*, 207 F.3d at 789. As the Sixth Circuit later explained, *Lara* thus "effectively ignored the phrase 'comparable to those for members of the general public,' and in so doing failed to take sufficiently into account the purpose of Title III of the ADA." *United States v. Cinemark*, *supra*, at *6.[2] And as the court of appeals explained here, the *Lara* court also ignored significant evidence of industry practice – publications from professional and trade industry organizations

[2] Moreover, the Fifth Circuit's construction of "lines of sight" as meaning only "unobstructed" is inconsistent with the ADAAG as a whole. The drafters of the regulation knew how to impose a prohibition on obstruction when they meant "unobscured." See, *e.g.*, 28 C.F.R. Pt. 36, App. A §4.6.3 ("Parking signs shall be located so they cannot be obscured by a vehicle parked in the space.").

that recognize that any analysis of "lines of sight" must take account of the angle on which those lines lie. See Pet. App. 14a (referring to SMPTE publication stating that "the normal line of sight is 12° to 15° below the horizontal," and NATO publication stating that "lines of sight are measured in degrees").

The *Lara* court relied on the fact that the Department of Justice and the Access Board never explicitly discussed issues of viewing angle at the time they issued the ADAAG. See *Lara*, 207 F.3d at 788-89. The court also relied on the Access Board's request, eight years *after* the promulgation of the ADAAG, for public comment regarding "whether to include specific requirements" governing stadium-style movie theaters in its amended accessibility guidelines. See 64 Fed. Reg. 62248, 62278 (Nov. 16, 1999). The *Lara* court read this request as implicitly recognizing that the existing ADAAG did not require wheelchair users' lines of sight to be comparable in the viewing angles they afford to the lines of sight enjoyed by nondisabled patrons. See *Lara*, 207 F.3d at 788.

But as the court of appeals noted here, it is irrelevant whether the agencies that promulgated Section 4.33.3 actually contemplated in 1991 the way in which the plain text of the "lines of sight comparable" language would apply to the stadium-style movie theaters that began sprouting up four years later. Pet. App. 16a (citing *Yeskey*, 524 U.S. at 212 ("[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.") (internal quotation marks omitted)). And as the Sixth Circuit observed, see *United States v. Cinemark*, *supra*, at *6-*7, the subsequent administrative history relied on by the *Lara* court is similarly unpersuasive. Not only are subsequent agency statements a "hazardous basis" on

which to determine the regulation's plain meaning, *cf. Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) ("[S]ubsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress.") (internal quotation marks omitted), but the 1999 Access Board statement on which the *Lara* court relied does not in fact reject the plain-language interpretation of "comparable" employed by the court of appeals here. As the Sixth Circuit noted, *United States v. Cinemark*, *supra*, at *6, the Access Board expressly stated that wheelchair users confined to the first few rows of stadium-style theaters "are afforded inferior lines of sight to the screen." 64 Fed. Reg. 62278, reprinted at App. 2, *infra*. That the agency was considering adding more "specific" language to address viewing-angle issues in such theaters, *id.*, suggests only that the Access Board thought a more precisely targeted response to this particular problem might be appropriate. It does not at all detract from the fact that viewing angle issues are already addressed by the general comparability requirement in Section 4.33.3 as currently written. See *United States v. Cinemark*, *supra*, at *6.[3]

[3] The dissenting judge below suggested that because many of the ADAAG requirements impose very specific, detailed obligations on builders (*e.g.*, "the regulations delimit knee space to the millimeter"), the courts should not give independent effect to the generally phrased requirement of "comparable" lines of sight in circumstances the regulation's drafters did not "expressly anticipate[ ]." Pet. App. 26a (internal quotation marks omitted). That suggestion has it backwards. That the regulations incorporate broadly phrased standards like the "lines of sight comparable" requirement demonstrates that the drafters recognized they could not expressly anticipate and create precisely framed rules governing all of the possible circumstances to which the regulations would apply. And indeed, the "lines of sight comparable" provision is not the only provision of the ADAAG that incorporates such a broad general standard. See, *e.g.*, 28 C.F.R. Pt. 36, App. A §4.6.3

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Each of the two courts of appeals to have addressed the issue since *Lara* have recognized the flaws in the Fifth Circuit's reasoning in that case, and every district court decision to have followed *Lara* – including the district court decision in this case – has been overturned on appeal. See *Meineker v. Hoyts Cinemas Corp.*, 216 F.Supp.2d 14 (N.D.N.Y. 2002), vacated, 2003 WL 21510423 (2d Cir., July 1, 2003); *United States v. Cinemark USA, Inc.*, No. 1:99 CV-705 (N.D. Ohio, Nov. 19, 2001), rev'd, 2003 WL 22508500 (6th Cir., Nov. 6, 2003); see also *United States v. Hoyts Cinemas Corp.*, 256 F.Supp.2d 73 (D. Mass. 2003) (ruling in accord with the court of appeals here); *United States v. AMC Entertainment, Inc.*, 232 F.Supp.2d 1092 (C.D. Cal. 2002) (same). Given the impressive number of stadium-style theater cases currently winding their way through the lower courts – a fact emphasized by Petitioners, see Pet. 12-13 & n.10 – the conflict in the circuits may well resolve itself. Even if it does not, this Court's ultimate decision will be aided by further airing of the issues in the circuits.[4]

("parking signs shall be located so they cannot be obscured by a vehicle parked in the space"); §4.30.3 ("Characters and numbers on signs shall be sized according to the viewing distance from which they are read"); §4.8.2 ("The least possible slope shall be used for any ramp.").

[4] Petitioners urge (Pet. 18) that the existence of differing accessibility standards in different circuits places an undue burden on architects and nationwide enterprises. As the Sixth Circuit recently explained, Petitioners' concerns are overblown: "any chain of stores that extends across state lines is subject to the different building codes of the various states in which it chooses to build a store (and probably to a variety of different local ordinances at each location as well)." *United States v. Cinemark, supra*, at *8 n.7. While inter-circuit uniformity in the interpretation of federal law is to be desired, the lack of uniformity created by the Fifth Circuit's *Lara* decision imposes no greater burden

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The argument that this Court should defer consideration of these issues is particularly strong here given the essentially interlocutory nature of the court of appeals' decision. That court directed the district court to enter summary judgment for Respondents on the issue of liability, because the lines of sight Petitioners offered to wheelchair users were not, in any meaningful sense of the term, "comparable" to those offered nondisabled patrons. Pet. App. 17a. But the court of appeals had no need to delineate the precise scope of the obligations Section 4.33.3 places on Petitioners, because it left the design of the remedy to the district court in the first instance. Petitioners' challenges to the supposed "ambiguity" of the court of appeals' decision, Pet. 13-14, would be best addressed on review of a concrete remedial order. Such an order, unlike the basic finding of liability, would be required much more specifically to describe the extent of the obligations imposed on Petitioners. See *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of certiorari) (certiorari inappropriate when court of appeals simply ordered judgment for respondents on liability but remanded on the question of remedy).

And there is yet another reason for this Court to hesitate before inserting itself into the controversy regarding the application of Section 4.33.3 to stadium-style theaters. The Access Board is currently in the midst of

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on architects or interstate enterprises than they face all the time in seeking to comply with diverse local building codes. There is no compelling reason for this Court to short-circuit the full consideration of the stadium-style theater issue in the lower courts.

"completely updat[ing] and revis[ing]" the ADAAG. Access Board, Revision of ADA and ABA Accessibility Guidelines, available at http://www.access-board.gov/ada-aba/status.htm (accessed November 11, 2003). As Petitioners emphasize, the Access Board's Notice of Proposed Rulemaking for these revisions specifically stated that the agency was "considering whether to include specific requirements in the final rule that are consistent with DOJ's interpretation of 4.33.3 to stadium-style movie theaters." 64 Fed. Reg. 62278. That statement does not, as the Fifth Circuit believed, override the plain meaning of the "lines of sight comparable" language in the current regulation. See pp. 10-11, *supra*. But it does suggest that the Access Board's final rule, which has not yet issued, might obviate any continuing controversy regarding application of the ADAAG to stadium-style theaters.

II. The Generic Question Of The Deference Accorded To An Agency's Interpretation Of Its Regulations Does Not Warrant This Court's Review

Petitioners urge that there is a "significant tension in this Court's judicial deference doctrine." Pet. 19. They contrast two decisions of this Court: (1) *Auer*, 519 U.S. at 461-463, which deferred to the Secretary of Labor's interpretation, published in an *amicus* brief filed in this Court, of a regulation the Secretary had promulgated to implement the Fair Labor Standards Act (FLSA); and (2) *Christensen v. Harris County*, 529 U.S. 576, 586-588 (2000), which declined to defer to a Department of Labor opinion letter's interpretation of the FLSA regulations. Petitioners contend that these cases stand in a "tension" that has led

to "confusion in the lower courts," Pet. 20. Petitioners are incorrect.

Far from standing in tension, *Auer* and *Christensen* together demarcate the proper boundaries of deference to agencies' interpretations of their own regulations. In *Auer*, the Court deferred to the Secretary's interpretation because the relevant regulation "comfortably [bore] the meaning the Secretary assign[ed]," *Auer*, 519 U.S. at 461, and the interpretation "reflect[ed] the agency's fair and considered judgment on the matter in question," *id.* at 462. In *Christensen*, the Court expressly held *Auer* inapplicable because the agency interpretation at issue *conflicted* with the unambiguous text of the relevant regulation. See *Christensen*, 529 U.S. at 588.

In their effort to show "confusion" in the lower courts, Pet. 20, petitioners do not identify any circuit-court cases that purport to reject these principles or find a conflict between *Auer* and *Christensen*. Instead, they point to cases in which, like the *Christensen* Court, lower courts found it inappropriate to defer to particular agencies' interpretations of particular regulations, whether because those interpretations did not "reflect the agency's fair and considered judgment," *Auer*, 519 U.S. at 462, or because they conflicted with the regulation's unambiguous terms, see *Christensen*, 529 U.S. at 588. See Pet. 20-24 (collecting cases). That other courts applying the *Auer* and *Christensen* principles to *other* agencies' interpretations of *other* regulations found deference inappropriate on the facts before them does not at all suggest that the court of appeals applied any different principle when it deferred to the Department of Justice's interpretation of the ADA Accessibility Guidelines here. To the contrary, the court of appeals expressly relied on *Auer* here. Pet. App. 13a n.6. It

is to be expected that lower courts will reach different results when they apply well-settled but general rules of law like this Court's deference doctrine to a diverse array of factual contexts.

There is thus no conflict in the circuits or other reason for this Court to grant certiorari to revisit the generic question of the deference accorded to agencies' interpretations of their own regulations.[5] In the end, Petitioners all but admit that they seek nothing more than to correct the court of appeals' purported "misappl[ication]" of *Auer*. See Pet. 25 (arguing that the court of appeals' holding "allows courts to misapply *Auer*" and that the Department of Justice's interpretation here was significantly different from the Secretary of Labor's interpretation to which this Court deferred in *Auer*). But this Court does not sit to engage in such error correction. See S.Ct. R. 10 (certiorari ordinarily is not granted on the basis of "misapplication of a properly stated rule of law").

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[5] Even if there were, this case would be a singularly inappropriate vehicle for considering the extent of deference accorded to agencies' interpretations of ambiguous regulatory terms. Far from being ambiguous, the regulation at issue here plainly compels the interpretation the Department of Justice has placed on it. Accordingly, the court of appeals' decision was correct even if it was inappropriate to accord deference to the position articulated in the Department's *amicus* brief. See *United States v. Cinemark*, *supra*, at *4 (relying on the "plain meaning" of the regulation to reach the same result the court of appeals reached here).

III. Petitioners' Factbound Contention That The Court Of Appeals' Decision Represents Impermissible Retroactive Lawmaking Does Not Warrant This Court's Review

Petitioners contend (Pet. 26-29) that the court of appeals adopted an interpretation of Section 4.33.3 that was not "reasonably comprehensible" from the text of the regulation. Accordingly, Petitioners argue, that court's decision represents impermissible retroactive legislation that denied them fair warning in violation of the Due Process Clause. This effort to constitutionalize Petitioners' disagreement with the lower court's reading of Section 4.33.3 does not justify a grant of certiorari.

Petitioners identify no conflict in the circuits regarding the fair warning principle. They contend only that the court of appeals' decision incorrectly applied that principle. See Pet. 26-29. Once again, Petitioners seek mere error correction. Moreover, there is simply no error to correct here. As we have explained, see pp. 8-9, *supra*, and the Sixth Circuit squarely held, see *United States v. Cinemark*, *supra*, at *4, Section 4.33.3's text does more than provide fair warning that it is subject to the interpretation placed on it by the court of appeals; the plain text of the regulation compels that interpretation. The regulation requires that Petitioners provide patrons who use wheelchairs with "lines of sight comparable to those for the general public." 28 C.F.R. Pt. 36, App. A §4.33.3. The court of appeals held that Petitioners fail to provide "comparable" lines of sight when they provide nondisabled patrons with "a range of comfortable viewing locations" but relegate wheelchair users to the worst seats in the house – seats that require them to experience discomfort when they must "crane their necks and twist their bodies in

order to see the screen." Pet. App. 17a. That interpretation is consistent with the industry practice of measuring "lines of sight" by the viewing angle they afford. See Pet. App. 14a (quoting SMPTE and NATO publications). Indeed, it is "simply inconceivable" that any other interpretation of the regulation and its underlying statute could be proper. *Id.* at 17a.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

42 U.S.C. §12182

§12182. Prohibition of discrimination by public accommodations

(a) General rule

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

(b) Construction

(1) General prohibition

(A) Activities . . .

(ii) Participation in Unequal Benefit

It shall be discriminatory to afford an individual or class of individuals, on the basis of disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage or accommodation that is not equal to that afforded to other individuals.

* * *

Access Board Commentary on 28 C.F.R. Pt. 36, App. A §4.33.3, 64 Fed. Reg. 62248, 62278 (November 16, 1999) (Excerpt)

* * * . As stadium style theaters are currently designed, patrons using wheelchair spaces are often relegated to a few rows in each auditorium, in the traditional sloped floor area near the screen. Due to the size and proximity of the screen, as well as other factors related to stadium-style design, patrons using wheelchair spaces are required to tilt their heads back at uncomfortable angles and to constantly move their heads from side to side to view the screen. They are afforded inferior lines of sight to the screen. * * *